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Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

MICHAEL TESTON,

Petitioner,

v.

ARKANSAS STATE BOARD OF CHIROPRACTIC EXAMINERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, Michael Teston, a licensed physical therapist in Arkansas, was assessed a $10,000.00 civil penalty by the Arkansas Chiropractor Board for violating constitutionally vague provisions of the Arkansas Chiropractic Practices Act. Mr. Teston appealed the Chiropractor Board's decision, and the Arkansas Supreme Court held that Mr. Teston's argument that the Arkansas Chiropractic Practices Act was unconstitutionally vague was not preserved for appeal, because it was not properly raised at the administrative level even though the Chiropractor Board had no authority to rule on whether or not the Arkansas Chiropractic Practices Act was unconstitutional. This Petition presents the following question:

Whether a state can require a citizen, consistent with due process, to raise a federal constitutional argument in a state administrative hearing in order to preserve the issue for adjudication in state court, when the administrative body has no authority under state law to consider the constitutional issue.

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STATEMENT OF JURISDICTION

The Arkansas Supreme Court decided the case below on April 7, 2005, and a timely petition for rehearing was denied without opinion on May 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix reproduces the text of the Due Process Clause, U.S. Const. amend. XIV, § 1; the Supremacy Clause U.S. Constitution Article VI, Cl. 2; provisions of the Arkansas Chiropractic Practices Act, Ark. Code Ann. § 17-81-101 *et seq.*; Physical Therapist Act, Ark. Code Ann. § 17-93-101, *et. seq.*; provisions of the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-201, *et seq.*; and selected regulations of the Arkansas Register, 12 Ark. Reg. Nos. 1, 2 and 3, Docket No. 029.00.88-003 (1988).

STATEMENT OF THE CASE

This case results from a $10,000.00 civil penalty awarded in an administrative hearing enforcing an unconstitutionally vague statute. Michael Teston has practiced as a licensed physical therapist in Arkansas for more than 20 years. In 2001, Mr. Teston treated Katherine Fryar who had been referred to him for physical therapy by a physician. Over a year after Mr. Teston had treated Ms. Fryar, she submitted a

complaint to the State Board of Chiropractic Examiners (the "Chiropractor Board") resulting in an investigation by the Chiropractor Board as to whether Mr. Teston was practicing chiropractic without a license in violation of Arkansas Chiropractic Practices Act. Ark. Code Ann. § 17-81-303 (Repl. 2002). The Chiropractor Board sent its undercover investigator posing as a patient to Mr. Teston for treatment, and he too filed a complaint to the Chiropractor Board.

Prior to action by the Chiropractor Board, the Arkansas Board of Physical Therapy ("Physical Therapy Board") met to consider the complaints of Ms. Fryar and the Chiropractor Board's investigator. The Physical Therapy Board entered a declaratory order finding that the procedures that were the subject of the complaints were "mobilization" within the scope of Mr. Teston's profession as a physical therapist under the Arkansas Physical Therapy Act. Ark. Code Ann. § 17-93-101, *et seq*.

The Chiropractor Board then held a hearing concerning the same complaints, and in direct irreconcilable conflict with the Physical Therapy Board's order, the Chiropractor Board ruled that the complained of procedures were "manipulation" reserved for licensed chiropractors, and that Mr. Teston violated the Arkansas Chiropractic Practices Act. As a result of this ruling a $10,000.00 civil penalty was assessed against Mr. Teston. In the Chiropractor Board hearing, his attorney did not formally raise the constitutional question that the Arkansas Chiropractic Practices Act was unconstitutionally vague, since manipulation or mobilization are similarly defined.[1]

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1. Ark. Code Ann. § 17-81-102(6)(A) defines the "practice of chiropractic" to include "**spinal manipulations** and **spinal**

(Cont'd)

But when Mr. Teston appealed the Chiropractor Board's decision to the Pulaski County Circuit Court, he raised the constitutional issue. That court confirmed the ruling of the Chiropractor Board. Mr. Teston appealed to the Supreme Court of Arkansas which refused to consider Mr. Teston's constitutional claim, because it was not first raised at the administrative level. In its ruling, the Arkansas Court stated that "in order to preserve a constitutional argument in an appeal from an agency decision the constitutional issue must first be raised and developed at the administrative level." Opinion, p. 16. This ruling was in spite of the fact that Mr. Teston had raised this argument to the Pulaski Circuit Court, the first court having jurisdiction to decide a constitutional issue.

The Arkansas Supreme Court relied heavily on its own ruling in *AT&T Communications of the Southwest, Inc. v. Arkansas Public Service Commission*, 344 Ark. 188, 40 S.W.3d 273 (2001), which established that an administrative agency in Arkansas may not declare a statute unconstitutional because it violates the separation of powers doctrine. "However, this does not mean that a constitutional issue

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(Cont'd)

mobilizations such as any type of pressure, force, thrust or passive movement, . . . applied to the spinal vertebrae or their adjacent articulations by hand or mechanical device or by other incidental adjustments, for the restoration and maintenance of health." (emphasis added). Conversely, Ark. Code Ann. § 17-93-102(6)(B)(c) defines the "practice of physical therapy to include any: mobilization, i.e., passive movement accomplished within normal range of motion of the joint, but excluding spinal manipulation and adjustment." Under one act, physical therapy practice of mobilization is unlimited, under another spinal mobilization is limited, and both constitute passive movement.

should not be *raised and developed* at the administrative level," (emphasis in original) (the "Rule"). *Id.* at 279. The apparent justification of this contradictory ruling, is found in the court's prior ruling that "the development of facts before [an administrative body] is critical . . . the agency is the only forum where a full development of the facts and law can occur; without that complete development of the facts and arguments . . . this court cannot fulfill its reviewing function." *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Commission*, 69 Ark. App. 323, 13 S.W.2d 197 (2000).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to address an issue of great national importance regarding the Constitution.

The Arkansas Supreme Court has used a local practice to deny a right granted to Mr. Teston by the federal Constitution, and therefore, he has not received the process he is due under the U.S. Constitution. It has been clearly established that this Court will protect an individual's federal rights from being limited by local practice. *Felder v. Casey*, 487 U.S. 131, 138 (1988). The ruling of the Arkansas Supreme Court in Mr. Teston's case is a direct attack on this long held principle and is also in violation of the Supremacy Clause and the Due Process Clause of the U.S. Constitution. Therefore, this Court's intervention is needed, and several aspects of this case make review especially appropriate:

First, review is warranted to resolve a conflict between Arkansas law and decisions of this Court regarding the rights of individuals to have federal rights protected and not denied as a result of a local practice. In this case the pointless procedural practice of requiring Mr. Teston to raise his

argument that the Arkansas Chiropractic Practices Act was unconstitutionally vague to an administrative body that had no authority to rule on the issue, has denied Mr. Teston an inherent federal right guaranteed to him by the U.S. Constitution. It is critically important that this Court firmly establish that such requirements are prohibited by *Felder*.

Second, this Court has previously ruled that a state may not create "unreasonable obstacles" of an individual's federal rights. *Brown v. Western Railway*, 338 U.S. 294, 301 (1949). The only justification given by the Arkansas Supreme Court for this procedural requirement is the "full development of the facts." Opinion, p. 16. Because this development may be done at the Arkansas circuit court level, which has the authority to rule on a constitutional issue under Arkansas law, it is apparent that the Arkansas Supreme Court requirement is indeed an unreasonable obstacle to Mr. Teston's federal rights. It is imperative that this Court continue to refine the definition of "unreasonable obstacles" to prevent further limitation of federal rights in favor of local practice.

Third, this Court has previously established that important federal rights must be decided in court in the first instance. *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). But Mr. Teston was required by the Arkansas Supreme Court to raise his constitutional argument in the first instance before an administrative body made up of his direct competitors who, by their interpretation of an overly vague statue, denied him his constitutional rights. This case is an important opportunity to establish whether or not an individual's right under the U.S. Constitution to have constitutional issues determined in court in the first instance can be conditioned upon first raising those issues in an administrative hearing.

I. This Court Should Grant Review To Consider Whether A Citizen In A State Administrative Hearing Can Be Required To Raise A Federal Constitutional Argument In Order To Preserve It For Judicial Decision.

The Arkansas Rule that a constitutional challenge must first be raised at the administrative hearing originated in *Hamilton v. Jeffery Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), even though the Arkansas courts have acknowledged many times that an administrative agency has *no jurisdiction* to declare an act of the legislature unconstitutional. *Cf. Watson v. State*, 313 Ark. 304, 642 S.W.2d 723 (1993). This ruling directly conflicts with the long held standard established by this Court that a "federal right cannot be defeated by the forms of local practice." *Felder* at 138.

a. The requirement serves no legitimate legal purpose.

The stated reason by the Arkansas Supreme Court for this rather odd Rule is that "Constitutional questions often require an exhaustive analysis which is best accomplished by an adversary proceeding," and "full development of the facts" by the administrative agency is required. Opinion, p.16. So the Rule mandates an adversary proceeding before a tribunal with no jurisdiction. By doing this, the Arkansas Supreme Court has eliminated Mr. Teston's constitutional rights by a local practice in direct violation of *Felder* and the Supremacy Clause of the U.S. Constitution. *Brown* at 301.

In *Felder*, the State of Wisconsin's notice-of-claim statute was held unconstitutional under the Supremacy Clause. The statute required a person bringing an action in state court

against a state or local government entity to notify the defendant entity within 120 days regarding the nature of the claim. The entity then had 120 days to grant or disallow the relief. Upon denial, plaintiff had six months to bring his cause of action. Strikingly similar to the Arkansas Supreme Court's "full development of the facts" ruling, the State of Wisconsin argued, in part, that the notice-of-claim statute was necessary to determine validity of claims. *Id.* at 137. Obviously a determination of validity of a claim occurs upon the "full development of the facts." Therefore, Wisconsin's argument and Arkansas' argument are the same. This argument was rejected by this Court which stated that "the relative importance to the state of its own law is not material when there is a conflict with a valid federal law." *Id.* at 138 (Quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

b. The state requirement violates Mr. Teston's constitutional rights.

The Arkansas Supreme Court has denied Mr. Teston's constitutional rights in favor of a nonsensical local practice to require a party to raise a constitutional argument before a body which has no authority to consider it. Such a useless local requirement which obstructs a federal right is exactly what this Court sought to stop in *Felder*. The application of such a hard and fast rule, especially when it is not needed, is a denial of due process, because the plain reading of the record in this case reveals "an exhaustive analysis" of the meaning (or lack thereof) of the terms "mobilization" and "manipulation". What additional analysis or fact is needed for the court to determine constitutionality? The exhaustive analysis was in the record, but was not considered simply because the constitutional issue was not formally raised in the administrative board hearing. There is certainly no cause for denying Mr. Teston's constitutional rights over such technicalities.

The Chiropractor Board had no authority to consider whether or not the Arkansas Chiropractic Practices Act was unconstitutional and serves as only a procedural obstacle to Mr. Teston's constitutional rights. A procedural rule which burdens or conditions an unconditional right violates due process. *Brooks v. Tennessee*, 406 U.S. 605 (1972). While a state is free to regulate court procedure, it may not violate fundamental principals of justice in doing so. *Snyder v. Commonwealth*, 291 U.S. 97 (1934).

To labor under a civil penalty imposed by a state board with no jurisdiction to determine whether the authority for that penalty is constitutional, and then prohibit the judges from ruling on the constitutionality because the issue was not raised with the board, is a local practice that is fundamentally unfair and violates this Court's established principles. The issue presented by this case regarding whether the Arkansas Supreme Court may limit Mr. Teston's federal constitutional rights based on a local practice is of the highest importance and should be considered by this Court. The Arkansas Supreme Court's barring Mr. Teston from raising his claim that the Arkansas Chiropractic Practices Act was unconstitutional due to what is effectively a nonsensical procedural rule, has directly contradicted the long held standard established by this Court that a federal right cannot be defeated by the forms of local practice. This Court should review this matter to determine whether or not Mr. Teston's federal rights have been limited by the Arkansas Supreme Court.

II. The Arkansas Supreme Court's Creation Of Obstacles In The Presentation Of Mr. Teston's Federal Right In Violation Of The Due Process Clause Requires Review.

The requirement of the Arkansas Supreme Court that Mr. Teston raise his constitutional argument to an administrative body made up of his competitors when they had no authority to rule on the matter violated the Due Process Clause of the U.S. Constitution. This Court has held that a state "may not put 'unreasonable obstacles in the way' of a [party] who seeks its courts to obtain what [a] federal act gives him." *Brown* at 301, citing *Davis v. Wechsler*, 263 U.S. 22, 25 (1923). The Arkansas Supreme Court's ruling is directly in violation of *Brown*, and serves no purpose whatsoever except to provide an obstacle to Mr. Teston pursuing a right granted to him under the U.S. Constitution.

a. Mr. Teston should not be required to seek redress of federal rights from an adversarial body.

In addition to requiring Mr. Teston to raise his constitutional argument in front of an administrative body which has no authority to consider such an issue, the Arkansas Supreme Court also required Mr. Teston to seek redress in the first instance of his constitutional claim from a board made up of individuals who directly compete against him and others in his profession.[2] As a licensed physical therapist, many of the techniques permissibly used by Mr. Teston are confusingly similar to those used by a chiropractor. While

2. The Arkansas Chiropractic Practices Act provides that five of the seven members of the Chiropractor Board "shall be qualified chiropractors." Ark. Code Ann. § 17-81-201(b)(1).

being vindicated by the Physical Therapy Board, Mr. Teston was assessed a $10,000.00 civil penalty by the Chiropractor Board for the exact same techniques. It is obvious that the Chiropractor Board is hostile.

It is for these reasons that this Court has found a denial of due process when "those who [seek] to vindicate their federal rights in state courts [are] required to seek redress in the first instance from the very state officials whose hostility to this rights precipitated their injuries." *Felder* at 147. As a physical therapist, Mr. Teston is a direct competitor to the chiropractors who sat in judgment of him on the Chiropractor Board. In requiring Mr. Teston to present his constitutional vagueness argument to his adversaries, the Arkansas Supreme Court violated Mr. Teston's rights to due process.

Due process requires an impartial and disinterested tribunal when civil penalties are involved, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), and a requirement that Mr. Teston's competitors make "an exhaustive analysis" prior to a court considering his federal rights violates *Marshall*, and does not provide due process.

b. Using obscure procedure to deny Mr. Teston a federal right is unconstitutional.

Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal law. *Brown* at 298. In *Brown* this Court considered whether the general demurrer resulting in a final dismissal of a state action based on federal law was in violation of the U.S. Constitution, and stated "should this court fail to protect federally created rights from dismissal because of over exacting local requirements for meticulous pleadings,

desirable uniformity in adjudication of federally created rights could not be achieved." *Id.* at 299. In the present case, the Arkansas Supreme Court has defeated Mr. Teston's federal rights based upon procedure far more egregious than demurrer. While demurrer is now obsolete in many jurisdictions, it was, at the time, a fundamental practice of law across the United States. Whereas, the local practice created by the Arkansas Supreme Court is completely obscure and defies common sense.

The conflicting and pointless nature of the procedural requirement of the Arkansas Supreme Court becomes even more harsh in Mr. Teston's case where for the first time the court added even another requirement to litigate a constitutional issue – that it be *pled*. At Page 17, the Opinion reflects that Mr. Teston failed to "file any pleadings with the Chiropractor Board". The Chiropractor Board has no codified rules, and requires no pleadings at all. 12 Ark. Reg. Nos.1, 2 and 3, Docket N. 029.00.88-003 (1988). Furthermore, the Arkansas Administrative Procedure Act, which governs practice before administrative agencies, has no requirement for a respondent to file pleadings. Ark. Code Ann. § 25-15-209-213. Without any legislative act, nor administrative rule, the Arkansas Supreme Court has now made new law requiring administrative pleadings in order to preserve a federal constitutional right. A review by this Court will undoubtedly come to the conclusion that the virtually incomprehensible requirements of the Arkansas Supreme Court are indeed "unreasonable obstacles" to Mr. Teston's federal rights clearly prohibited by this Court.

III. A State Rule Requiring An Administrative Hearing In The First Instance Conflicts With The Federal Rule That Constitutional Issues Be Raised In Court In The First Instance.

The Arkansas Supreme Court requires that constitutional rights be raised in the first instance, in the administrative hearings, and has made it abundantly clear that the administrative "agency is the *only* forum" for the development of those rights. *Southwestern Bell Tel. Co., Id.* (emphasis added).

Furthermore, the Arkansas Supreme Court has made it clear that it will only review the administrative agency finding – not the judicial finding, because without an agency development of facts, the "court cannot fulfill its reviewing function." *Id.* Clearly, the Arkansas Rule requires constitutional issues to be raised in the first instance in administrative hearings – not court hearings.

Such matters of high importance as constitutional rights should be addressed judicially in the first instance. This Court has held that federal rights actions "*belong in court*" and are judicially enforceable in the first instance. *Felder* at 148, citing *Burnett* at 55. In conflict with this Court's standards, the Arkansas Supreme Court has relegated a federal constitutional right to an administrative body in the first instance.

The Arkansas Supreme Court's desire to have "full development of the facts and law" is admirable since the development of constitutional law is essential. However, it is not necessary to have a party to an administrative hearing go through the obstructive and futile exercise of raising a

constitutional issue in that hearing to accomplish this goal. Under Arkansas law an appeal to the Arkansas Supreme Court from an administrative body is first considered by the local circuit court. At that level, not only can all facts and law be developed as desired by the Arkansas Supreme Court, they can be developed under the rules of evidence by the circuit judge – not a chiropractor operating with no rules.

The Arkansas Rule requiring constitutional issues to be raised in the first instance before an administrative board is particularly obstructive of due process, because administrative boards in Arkansas operate outside the rules of evidence. Ark. Code Ann. § 25-15-213(4)

The Rule is therefore defective, because it requires an exhaustive analysis by a licensing board headed by a chiropractor, not a circuit court headed by a judge. A fully developed record for constitutional analysis of the taking of property through the imposition of a civil penalty should be developed under the rules of evidence in court, not under the loose procedures of the Chiropractor Board. For example, the Board investigator's transcription of a witness' statement which is filled with hearsay, was admitted in evidence. That is permissible in administrative procedures, but it would never pass muster in the circuit court. And this example points out further problems with the Rule: its application permits evidence inadmissible under constitutionally sound rules of evidence to be used to determine loss of constitutional property rights by civil penalties.

The Rule violates fundamental principals by abdicating the judicial function to the Chiropractor Board. Essentially, the Rule makes the Board a special master. The common

law definition of "master" is one appointed by the court to "take and report testimony". *Kimberly v. Arms*, 129 U.S. 512, 523 (1889). The Arkansas Supreme Court itself has severely limited the use of these non-judges to exceptional situations, and quoted with approval a truism that "Masters are simply substitutes for the judge". *Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394, 399 (1989).

In constitutional affairs dealing with basic individual rights, there should be no substitute for a judge. Clearly the Rule substitutes the Chiropractor Board for a judge to take testimony. In constitutional affairs especially, judges should make the exhaustive analysis. By substituting the Chiropractor Board for a judge, the Rule violates fundamental principals of justice. When analyzing the federal counterpart to Arkansas' master rule, this Court said non-judges are not to replace the Court, and to do so amounts to "little less than abdication of the judicial function depriving the parties of a trial before the court on the basic issues. . . ." *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957). Obviously, the Chiropractor Board has no knowledge of constitutional interpretation, and no experience taking testimony to interpret the Constitution, since the Board has no jurisdiction to do so. Consequently, the Rule violates due process.

It should also be noted that Mr. Teston raised his constitutional argument at the first level which it could be considered – the Circuit Court of Pulaski County, Arkansas. By doing so, he allowed for the "full development" the Arkansas Supreme Court desires. This fact makes the Arkansas Supreme Court's requirement even less useful and more punitive in its application here.

CONCLUSION

For the reasons explained above, Mr. Teston's Petition for Certiorari should be granted and the decision of the Arkansas Supreme Court should be reversed.]

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ARKANSAS DATED APRIL 7, 2005

SUPREME COURT OF ARKANSAS

No. 04-420

MICHAEL TESTON,

APPELLANT,

VS.

ARKANSAS STATE BOARD OF CHIROPRACTIC EXAMINERS,

APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANAS, NO. CV 03-502; TIMOTHY DAVIS FOX, CIRCUIT JUDGE,

AFFIRMED.

TOM GLAZE, Associate Justice

This appeal was certified to this court by the court of appeals in order to address apparent conflicts between the statutes governing the practice of chiropractic and the practice of physical therapy. Appellant Michael Teston appeals from an order of the Pulaski County Circuit Court affirming a decision by the Arkansas State Board of Chiropractic Examiners that Teston practiced chiropractic without a license.

Appendix A

Teston is a licensed physical therapist. From January 2001 through April 2001, Teston treated Katherine Fryar after she had been injured as a result of a car accident. In early 2002, Fryar filed a complaint with the Arkansas State Board of Chiropractic Examiners ("the Board") against Teston, which resulted in the Board sending an investigator, Dennis Hendrix, to Teston's office in May of 2002. While Hendrix was there, Teston performed certain treatment maneuvers on Hendrix. Based on Hendrix's investigation, the Board sent Teston a notice of hearing in which the Board alleged that Teston was practicing chiropractic without a license, in violation of Ark. Code Ann. § 17-81-303 (Repl. 2002).

During the pendency of the Chiropractic Board's investigation of Teston, Teston sought a declaratory order from the Arkansas State Board of Physical Therapy ("the Physical Therapy Board") pursuant to Ark. Code Ann. § 25-16-206 (Repl. 2002). After reviewing Fryar's and Hendrix's medical records and written statements, the Physical Therapy Board found that the treatments administered to both Fryar and Hendrix by Teston "were within the scope of the practice of physical therapy." The Physical Therapy Board concluded that Teston provided treatment within the scope of the practice of an individual providing physical therapy services. The Physical Therapy Board's declaratory order was entered on October 17, 2002.

On December 10, 2002, the Chiropractic Board held its hearing on Fryar's complaint, and at the hearing, Fryar testified that Teston's treatment of her consisted of, among other things, putting pressure on her spine such that the joints would pop. Fryar further stated that she had been

to a chiropractor before, and the things Teston did to her felt like what the chiropractor had done. Fryar also said that Teston referred to what he was doing as "releasing the joint." Investigator Hendrix likewise testified that Teston performed maneuvers on him that resulted in a "popping" or "snapping" in his spine.

Following the hearing, the Board issued its findings of facts and conclusions of law, in which the Board determined that Teston's treatment of both Fryar and Hendrix constituted the practice of chiropractic. Specifically, the Board stated that, based on both Fryar's and Hendrix's "testimonial description of [the patients' and Teston's] body and hand positions, pressure used, documentary evidence submitted, and testimony of the various expert witnesses, the Board finds that the maneuver[s] described by [Fryar and Hendrix] [were] . . . spinal manipulation[s] [that] can only be performed by licensed chiropractors in the State of Arkansas." As a result, the Board found that Teston's actions violated Ark. Code Ann. § 17-81-303(a)(1) (Repl. 2002) (prohibiting the practice of chiropractic without a license), and fined him $5,000 for each violation, for a total of $10,000.

Teston filed a petition for judicial review in the Pulaski County Circuit Court on January 17, 2003, alleging that the Board's decision was "in violation of constitutional and statutory provisions; was in excess of the Board's statutory authority; was made upon unlawful procedure; was not supported by substantial evidence; and was arbitrary, capricious, and an abuse of discretion." The trial court denied Teston's petition and affirmed the Board's decision. Teston filed a timely notice of appeal from the circuit court's

order, and on appeal to this court, he raises the following four points: 1) there is no substantial evidence that Teston was subject to the Arkansas Chiropractic Practices Act and not exempt due to performing procedures within the scope of the Arkansas Physical Therapy Act; 2) the Chiropractic Board's order should be reversed because it failed to follow statutory requirements that it make findings of fact; 3) the Chiropractic Act's prohibition against a physical therapist's performing a "manipulation" is unconstitutionally void for vagueness; and 4) the Chiropractor Board's order is not supported by substantial evidence.

We address Teston's first and fourth points together, as both arguments pertain to the quantity and quality of the evidence presented to the Board. Our standard of review regarding administrative decisions is well developed. Judicial review of agency decisions is governed by the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-212 (Repl. 2002). The appellate court's review is directed not toward the circuit court, but toward the decision of the agency. *Williams v. Arkansas State Board of Phys. Therapy*, 353 Ark. 778, 120 S.W.3d 581 (2003). That is so because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. *Id.*; *State Police Comm'n v. Smith*, 338 Ark. 354, 994 S.W.2d 456 (1999); *McQuay v. Arkansas State Board of Architects*, 337 Ark. 339, 989 S.W.2d 499 (1999). Our review of administrative decisions is limited in scope. *McQuay*, *supra*. Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or

characterized by an abuse of discretion. *McQuay, supra*; *In re Sugarloaf Mining Co.*, 310 Ark. 772, 840 S.W.2d 172 (1992).

We will not reverse the Board's decision if there is any substantial evidence to support it. *Arkansas Board Of Examiners v. Carlson*, 334 Ark. 614, 976 S.W.2d 934 (1998). Substantial evidence is evidence that is valid, legal, and persuasive and that a reasonable mind might accept to support a conclusion and force the mind to pass beyond speculation and conjecture. *Id.* The question is not whether the testimony would have supported a contrary finding, but whether it would support the finding that was made. *Id.* It is the prerogative of the board to believe or disbelieve any witness and to decide what weight to accord the evidence. *Id.* Similarly, the construction of a state statute by an administrative board or agency will not be overturned unless it is clearly wrong. *Thomas v. Arkansas Dep't of Human Servs.*, 319 Ark. 782, 894 S.W.2d 584 (1995). The appellant has the burden of proving that there is an absence of substantial evidence. *McQuay, supra.*

The party challenging the agency's action must prove that such action was willful and unreasonable, without consideration and with a disregard of the facts or circumstances of the case. *Williams, supra*; *Moore v. King*, 328 Ark. 639, 945 S.W.2d 358 (1997). To establish an absence of substantial evidence to support the decision the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Williams, supra.* Where the agency's decision is supported by substantial evidence, it automatically

follows that the decision cannot be classified as arbitrary and capricious. *Wright v. Arkansas State Plant Board*, 311 Ark. 125, 842 S.W.2d 42 (1992).

Teston argues first that there was no substantial evidence that he was subject to the Arkansas Chiropractic Practices Act, *see* Ark. Code Ann. § 17-81-101 *et seq.* (Repl. 2002), and he claims that he was exempt from the Chiropractic Act because he was performing procedures within the scope of the Arkansas Physical Therapy Act. *See* Ark. Code Ann. § 17-93-101 *et seq.* (Repl. 2002). We begin with an examination of the relevant statutes. The "exemption" Teston cites as part of the Chiropractic Act provides in pertinent part as follows:

> *Nothing herein shall be construed to prohibit or to require a license [under the Chiropractic Act] with respect to* any of the following acts:
>
> * * * *
>
> (3) *The practice of . . . physical therapy . . .* or any other branch of the healing arts as defined by the laws of this state as now or hereafter enacted, *it not being intended by this chapter to limit, restrict, enlarge, or alter the privileges and practices of any of these professions or branches of the healing arts.*

Ark. Code Ann. § 17-81-302(3) (Repl. 2002) (emphasis added).

Appendix A

In addition, although the Chiropractic Act makes it "unlawful for any person other than a physician licensed to practice chiropractic . . . to perform spinal mobilizations, spinal adjustments, or spinal manipulations as those terms are defined in § 17-81-102(7)," Ark. Code Ann. § 17-81-303(d)(1) (Repl. 2002), the Act further provides that "[n]othing contained in this subsection shall be construed to limit or restrict the authority of a licensed physical therapist to practice physical therapy as defined in § 17-93-102(6)." Ark. Code Ann. § 17-81-303(d)(2) (Repl. 2002). In turn, the "practice of physical therapy" is defined, in part, in Ark. Code Ann. § 17-93-102(5) (Repl. 2002) as follows:

> (B)(i) Alleviating impairments and functional limitations by designing, implementing, and modifying therapeutic interventions that include:
>
> * * * *
>
> (c) Manual therapy techniques, including soft tissue massage, manual traction, connective tissue massage, therapeutic massage, and *mobilization, i.e., passive movement accomplished within normal range of motion of the joint, but excluding spinal manipulation and adjustment* [.]

(Emphasis added.)

Finally, "spinal manipulation and adjustment" is defined within the Chiropractic Act as "the skillful or dexterous treatment whereby a corrective force or passive movement

of the joint is made to realign vertebrae or articulations to their normal juxtaposition." Ark. Code Ann. § 17-81-102(7) (Repl. 2002).

Teston argues that there is no substantial evidence in the record that he exceeded his authority under the Physical Therapy Act. Stated another way, he contends that the evidence supported a conclusion that he was practicing physical therapy, and therefore, he could not have been engaged in the unlawful practice of chiropractic. In support of his argument, Teston points out that the Physical Therapy Board determined that his actions fell within the definition of physical therapy, and he also notes that four physical therapists testified before the Chiropractic Board that Teston's treatments of Fryar and Hendrix constituted appropriate physical therapy treatments.

Teston's argument appears to be based fundamentally on his contention that the witnesses testifying on his behalf offered more compelling testimony than the witnesses who offered evidence against him. As stated above, however, the credibility and the weight of the evidence is within the administrative agency's discretion, and it is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord that evidence. *Williams*, 353 Ark. at 785.

Here, Katherine Fryar, the complaining witness, testified that she began to see Teston for physical therapy after sustaining injuries from a car accident. She described what Teston did to her as being like a "wrestling hold," in which he would "put pressure on the spine and the joint would pop."

Fryar stated that she would "cross [her] hands over [her] chest and lay down over his hand and would feel [and] hear a popping sound, feel the movement of the vertebrae." Fryar further asserted that she had been to a chiropractor before, and what Teston did to her felt like what the chiropractor had done; she said that Teston's treatment consisted of "very similar motion[s] and the results felt the same."

The Chiropractic Board also heard the testimony of investigator Dennis Hendrix, who testified that when he went to see Teston for treatment, Teston placed his fingertips on Hendrix's spine and indicated that he (Teston) could feel a "flat spot" in the thoracic area. Hendrix then testified that Teston had him lie prone on his back with his fingers laced together behind his head and his elbows pulled together; Hendrix "rose up" in this position, and then Teston pulled Hendrix's elbows even closer together and started repositioning Hendrix in a prone position. Just before reaching a flat, prone position, Teston pulled Hendrix's torso to the right, and Hendrix heard "two or three pops or snaps." Teston repeated this exercise a second time, and Hendrix heard two or three more pops or snaps. Teston later told Hendrix that what he had done was called a "joint mobilization." Hendrix stated that he, like Fryar, had been to a chiropractor before, and the procedure Teston had performed, as well as the results of the procedure, were the same as Hendrix had received from the chiropractor.

Finally, the Board heard the expert testimony of Dr. Edward Ashton, a chiropractor and physical therapist from Silver Springs, Maryland. Dr. Ashton testified that, in the practice of chiropractic, spinal manipulations or

adjustments are used in order to "move [a joint] outside of the normal range [of movement] . . . [in order to] facilitate the changes . . . to make that [joint] segment more normal." He defined an adjustment as "moving joints or spinal joints outside their normal range [of motion] . . . , which generally results in an audible release." Dr. Ashton further testified that he believed Teston manipulated Fryar's and Hendrix's joints by moving them outside of their normal range of motion, based on the "popping" sound to which both witnesses alluded.

As mentioned above, physical therapy involves the use of manual therapy techniques, including mobilizations, which are "passive movement[s] accomplished within [the] normal range of motion of the joint." § 17-93-102(6)(B)(i)(*c*). The evidence before the Chiropractic Board substantially supported its conclusion that Teston's treatment of Fryar and Hendrix involved moving their joints beyond their normal range of motion, and consequently, Teston's actions did not fall within the definition of the practice of physical therapy. Therefore, he was not entitled to the Chiropractic Act's "exemption" which he claims applies. Furthermore, the evidence supported the Chiropractic Board's conclusion that Teston performed "spinal manipulations" or "spinal adjustments," defined in Ark. Code Ann. § 17-81-103(7) as "a corrective force or passive movement . . . made to realign vertebrae or articulations to their normal juxtaposition," and both "spinal manipulation" and "adjustment" are encompassed within the definition of the "practice of chiropractic." *See* § 17-81-103(6)(A).

We note that the question is not whether the testimony would have supported a contrary finding, but whether it would support the finding that was made. Teston spends much of his argument contending that Dr. Ashton relied on the "popping" testimony received from Fryar and Hendrix to support his expert opinion that such a "popping" sound demonstrated that Teston was practicing chiropractic. However, we note that Dr. Ashton was qualified as an expert, and although Teston attempted to discredit his opinion, the apparent inconsistencies that were revealed on cross-examination (and on which Teston relies heavily on appeal) went only to the weight of Dr. Ashton's testimony. As discussed above, the credibility and the weight of the evidence is within the administrative agency's discretion, and it is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord that evidence. *Williams*, 353 Ark. at 785. Further, the Board had before it both Fryar and Hendrix's testimony to support its decision.

Here, we conclude that the evidence supports the finding made by the Board, namely, that Teston's treatments of Fryar and Hendrix were spinal manipulations that can only be performed by licensed chiropractors. As there was substantial evidence to support the Board's finding that Teston was practicing chiropractic, it necessarily follows that Teston was not practicing physical therapy, and therefore, he was not entitled to the "exemption" found in § 17-81-302(3).

Teston's next argument on appeal is that the Board failed to make sufficient factual findings. The Administrative Procedures Act (APA), Ark. Code Ann. § 25-15-210(b)(2)

(Repl. 2002), requires that an administrative adjudication be accompanied by specific findings of fact; the act provides in relevant part as follows:

> (b)(1) In every case of adjudication, a final decision or order shall be in writing or stated in the record.
>
> (2) A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. . . ,

In *Holloway v. Arkansas State Board of Architects*, 352 Ark. 427, 101 S.W.3d 805 (2003), this court cited with approval from *Nesterenko v. Arkansas Board of Chiropractic Examiners*, 76 Ark. App. 561, 69 S.W.3d 459 (2002), as follows:

> The court of appeals has described a "finding of fact" as "a simple straightforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. . . . [W]hen the reader is a reviewing court, the statement must contain all specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law." *Nesterenko*, [*supra*]. The purpose of requiring such factual findings is

> that they benefit the court in the following way: facilitating judicial review; avoiding judicial usurpation of administrative functions; assuring more careful and administrative consideration; aiding the parties in planning for hearings and judicial review; and keeping an agency within its jurisdiction. *Gordon v. Cummings*, 262 Ark. 737, 561 S.W.2d 285 (1978).

Holloway, 352 Ark. at 438-39.

In *Holloway*, this court determined that the findings of the State Board of Architects "contain[ed] sufficient facts relevant to the contested issue so that this court [could] determine whether the Board [had] resolved those issues in conformity with the law." *Id.* at 439. There, the facts included statements that Holloway, an engineer, was not a licensed architect, and that Holloway had prepared drawings and specifications for a building. The building consisted mainly of office space, and the primary purpose of the building was for human occupation or habitation. The cost of the building was in excess of $100,000, and the work performed by Holloway was not incidental to the practice of engineering. *Id.* at 438. These findings "reflected the facts to which [the Board's witness] testified, and because the findings incorporated a "proper and acceptable finding of the basic or underlying facts drawn from the evidence," they were sufficient under the APA. *Id.* at 439 (quoting from *Nesterenko, supra*).

Appendix A

In the instant case, the Chiropractic Board's findings were as follows:

> F-1. At all times pertinent to this hearing, [Teston] has been unlicensed to practice chiropractic in the State of Arkansas.
>
> F-2. Between January an April 2001, [Teston] treated . . . Katherine Fryar as a physical therapist following a car accident.
>
> F-3. During the three-month period, [Teston's] treatments included popping [Fryar's] cervical, thoracic and lumbar regions of [the] spine. Based on [Fryar's] testimonial description of her and [Teston's] body and hand positions, pressure used, documentary evidence submitted, and testimony of the various expert witnesses, the board finds that the maneuvers described by [Teston] were spinal manipulations which can only be performed by licensed chiropractors in the State of Arkansas. . . . [T]his finding shall constitute one violation.
>
> F-4. Based on [Teston's] testimony that the maneuvers were common in his practice, the Board finds that [Teston] may have treated others similarly. Due to the speculative nature of the finding, it shall not count as a violation.

> F-5. On May 30, 2002, the Board's investigator, Dennis Hendrix, visited [Teston's] clinic as part of his investigation and was treated. [Teston's] treatments included an upper body twisting maneuver that created a popping in the spine. Based on Mr. Hendrix's testimonial description of his and [Teston's] body and hand positions, pressure used, documentary evidence submitted, and testimony of the various expert witnesses, the board finds that the maneuvers described by [Teston] were spinal manipulations which can only be performed by licensed chiropractors in the State of Arkansas. This finding shall constitute one violation.

Thus, the Board's findings contain a statement that Fryar's treatment consisted of "popping [her] cervical, thoracic and lumbar regions of the spine," as well as a statement that Hendrix was treated with "an upper body twisting maneuver that created a popping in the spine." Both of these statements include sufficient details of the witnesses' testimony upon which the Board reasonably relied in reaching its decision. As in *Holloway, supra*, this court has facts from which we are able to determine whether the Board resolved the questions before it in conformity with the law. Thus, we conclude that the Board's factual findings were sufficient.

The final argument in Teston's appeal is that the Chiropractic Act's prohibition against a physical therapist performing a "manipulation" is unconstitutionally void for vagueness. He asserts that, because the Chiropractic Act

defines "spinal manipulation" the same as "spinal mobilization," but the Physical Therapy Act permits a physical therapist to perform all "mobilizations," there is an unconstitutionally vague overlap, as a person of ordinary intelligence would have to guess at the statutes' meaning.

Teston's constitutional argument is not preserved for appeal. In order to preserve a constitutional argument in an appeal from an agency decision, the constitutional issue must first be raised and developed at the administrative level. This court firmly established the rules governing the raising and developing of constitutional arguments before an administrative agency in *AT&T Communications of the Southwest, Inc. v. Arkansas Public Service Commission*, 344 Ark. 188, 40 S.W.3d 273 (2001), wherein the court wrote as follows:

> Our court has addressed the question of whether an administrative agency has the authority to declare a statute unconstitutional. In *Lincoln v. Arkansas Public Service Commission*, 313 Ark. 295, 854 S.W.2d 330 (1993), we held that to allow the Public Service Commission to *declare* unconstitutional a statute that it was required to enforce would violate the separation of powers doctrine. However, this does not mean that a constitutional issue should not be *raised and developed* at the administrative level. [Emphasis in original.]

Appendix A

This precise question has been considered in the context of other administrative agencies, such as the Workers' Compensation Commission. In *Hamilton v. Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), the court of appeals held that questions of constitutional magnitude must be addressed at the administrative agency level before such questions will be considered preserved for appeal. The [*Hamilton*] court wrote as follows:

> Until now, this court has not been asked whether constitutional questions must first be presented at the Commission level. The general rule is that the constitutionality of a statute will not be considered if raised for the first time on appeal. [Citation omitted.] This rule has also been followed by appellate courts in appeals from workers' compensation commissions and other administrative agencies. [Citations omitted.] Even though the Commission may not have the authority to declare statutes unconstitutional, we believe such issues should first be raised at the Administrative Law Judge or Commission level. Constitutional questions often require an exhaustive analysis which is best accomplished by an adversary proceeding. Obviously this can be done only at the hearing level.

> Requiring these constitutional issues to be considered by the Commission, we can be assured that such issues will be thoroughly developed before we are asked to rule on a statute's validity.

Hamilton, 6 Ark. App. at 335.

AT&T, 344 Ark. at 196-97. The court in that case continued as follows:

> The development of facts before the Commission thus is critical[.] . . . [T]he Commission is the only forum where a full development of the facts and law can occur; without that complete development of the facts and arguments below, this court cannot fulfill its reviewing function. Raising such constitutional issues before the Commission is significant even when a statute is challenged as unconstitutional on its face, especially since the interpretation given by the agency charged with its execution is highly persuasive. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'*, 69 Ark. App. 323, 13 S.W.2d 197 (2000).
>
> . . . AT&T provided only a bare reference to what it believed were issues of constitutional magnitude in its motion for reconsideration and its application for rehearing. No attempt was made to flesh out these constitutional arguments before the Commission, either in AT&T's pleadings or

> by proffering testimony of witnesses. Nor did AT&T request a ruling or determination by the Commission, or suggest the Commission was wrong in not making a determination. Thus, we hold that AT&T has not sufficiently developed its constitutional arguments to preserve them for this court's review.

Id. at 197-98.

In the instant case, the record fails to show that Teston filed any pleadings with the Chiropractic Board during its consideration of Fryar's complaint. The only mention of "vagueness" came in Teston's attorney's closing arguments before the Board, which Teston did not abstract.[1] Teston did not address this constitutional issue before the Board, nor did he request the Board's ruling on this constitutional argument. Accordingly, the Board made no conclusions of law concerning the constitutionality of the statute; its order stated only that Teston had practiced chiropractic without a license. Although Teston raised his constitutional argument before the trial court, this court does not, on an appeal from an agency decision, review the actions of the circuit court. *See Williams v. Arkansas State Board of Phys. Therapy*, 353 Ark. 778, 120 S.W.3d 581 (2003). Further, Teston did not even specifically challenge the statute as being void for vagueness in his petition for judicial review; instead,

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1. The record reveals that Teston argued that "[what] you have [is] a law that's too vague and nobody can tell what they're allowed to do. You know, where is it explained in your regulations or anything how anything that Mr. Teston did falls within the definition of spinal manipulation in your law?"

he generically alleged that the "Board's decision was in violation of constitutional and statutory provisions." Because Teston did not raise, address, or develop the issue of the constitutionality of the Chiropractic Act in the proceedings before the Chiropractic Board, this court must hold that his constitutional argument is not preserved for appeal.[2]

HANNAH, C.J., concurs.

BROWN and IMBER, JJ., not participating.

JIM HANNAH, Chief Justice, concurring. I concur with the result reached by the majority, but I write to express my concern that this case was not referred to the Arkansas State Board of Physical Therapy for review of Teston's treatments

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2. We also note that several of the *amicus curiae* briefs cite Ark. Code Ann. § 17-80-114 (Supp.2003), which provides for a method of arbitration between boards of the healing arts concerning scopes of practice; the statute provides that no board of the healing arts may take disciplinary action at the board level against a licensee of another board of the healing arts except as provided by § 17-80-114(c). However, neither Teston nor the State raises this argument. This court has repeatedly held that it will not address new points raised only by *amici curiae*, as the *amici curiae* must "take the case as [they] find[ ] it and cannot raise issues not raised by the parties or introduce new issues at the appellate level." *See Arkansas Transit Homes v. Aetna Life & Cas.*, 341 Ark. 317, 16 S.W.3d 545 (2000); *Priest v. Polk*, 322 Ark. 673, 912 S.W.2d 902 (1995); *City of Little Rock v. AT&T Communications of the Southwest, Inc.*, 316 Ark. 94, 870 S.W.2d 217 (1994); *Ferguson v. Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983) (*per curiam*); *Mears v. Little Rock School Dist.*, 268 Ark. 30, 593 S.W.2d 42 (1980); *Equilease Corp. v. United States Fidelity & Guar. Co.*, 262 Ark. 689, 565 S.W.2d 125 (1978).

administered to Fryar and Hendrix. In this case, the Chiropractic Board found that Teston practiced chiropractic without a license. In an order entered prior to the Chiropractic Board's hearing, the Physical Therapy Board concluded that Teston provided treatment within the scope of the practice of physical therapy.

Where there is a dispute between two licensing boards with regard to the same conduct, both boards are necessary parties. *See Arkansas State Med. Bd. v. Schoen*, 338 Ark. 762, 1 S.W.3d 430 (1999); *Arkansas State Med. Bd. v. Bolding*, 324 Ark. 238, 920 S.W.2d 825 (1996). Subsequent to its determination that Teston had engaged in the unauthorized practice of chiropractic, the Chiropractic Board should have referred the matter to the Physical Therapy Board for review of Teston's actions. Then, if not satisfied with the Physical Therapy Board's conclusion, the Chiropractic Board could have filed an action in circuit court naming Teston and the Physical Therapy Board as necessary parties.

In *Bolding*, *supra*, the Medical Board sued a dentist and a hospital where the dentist performed surgery, alleging that the dentist was engaged in the unauthorized practice of medicine. The trial court granted summary judgment in favor of the dentist and the hospital on the grounds that the dentist was practicing dentistry under the authority granted to him by the Dental Board. The trial court reasoned that it could not grant the relief requested by the Medical Board without exposing the dentist to inconsistent determinations by two different state agencies. On appeal, we held that the trial court erred in granting summary judgment because the

Dental Board should have been joined as a necessary party. We stated:

> It is obvious there exists a disagreement between the Medical Board and the Dental Board as to where the practice of dentistry stops and the practice of medicine commences. It is a significant question and one which should only be addressed upon a fully developed record with all the necessary parties before the court.

Bolding, 324 Ark. at 245, 920 S.W.2d at 829.

In *Schoen*, *supra*, the Medical Board sued a dentist and the Dental Board, alleging that the dentist, with the aid of the Dental Board, was engaged in the unauthorized practice of medicine by performing certain procedures, including the removal of a basal cell carcinoma from the forehead of a patient. The chancery court dismissed the action on the ground that the Medical Board had an adequate remedy at law in an administrative proceeding before the Dental Board. We reversed, stating that because the Dental Board had taken the position that the removal of the carcinoma was the practice of dentistry, it could not "posture itself as an objective and impartial tribunal." *Schoen*, 338 Ark. at 767, 1 S.W.3d at 433-34. Further, we noted:

> We are aware that any decision by the Dental Board would be subject to review in circuit court. But judicial review of an administrative appeal is limited. We conclude that under these circumstances the administrative remedy is inadequate

> and chancery court should retain jurisdiction pursuant to its authority under § 17-95-402(b) and (c).

Id.; 1 S.W.3d at 434 (citations omitted).

In *Schoen*, we concluded that it was "eminently preferable to have the legal and factual issues thrashed out in chancery court with the full participation of the Dental Board and the Medical Board." *Id.* at 768, 1 S.W.3d at 434. Likewise, in the instant case, it would have been preferable to have the legal and factual issues thrashed out in circuit court with the full participation of the Chiropractic Board and the Physical Therapy Board. In fairness to Teston, the Physical Therapy Board should have been joined as a party to the action. Nevertheless, I agree that this case must be affirmed because Teston failed to raise the argument that the Physical Therapy Board should have been joined as a necessary party.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS, SIXTH DIVISION DATED SEPTEMBER 19, 2003

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

CASE NO. CV03-0502

MICHAEL TESTON

PETITIONER

VS.

ARKANSAS STATE BOARD OF CHIROPRACTIC EXAMINERS,

RESPONDENT

ORDER

On the 18th day of September, 2003, came on for hearing the *Petition for Judicial Review and for Stay of Agency Decision* and from the pleadings filed herein, the transcript of the administrative proceeding, the argument of counsel, and all things and matters properly before the court the court doth find as follows:

1. On June 24, 2003, an Order was entered affirming the administrative record on appeal.

2. On July 25, 2003, an Order was entered setting aside the June 24, 2003 Order so that briefs and oral argument could be presented relating primarily to arguments involving the constitutionality of the applicable statutes.

3. Briefs were filed and a hearing was conducted on September 18, 2003.

4. Petitioner's first argument is that the decision of the board might be supported by substantial evidence with what the board's definition of "spinal manipulation" might be but that the record does not reflect that there is substantial evidence to support the board's decision in accordance with the actual definition of "spinal manipulation" as defined by A.C.A. § 17-18-102(7). The statutory definition is:

> "Spinal manipulation" and "adjustment" mean the skillful or dexterous treatment whereby a corrective force or passive movement of the joint is made to realign vertebrae or articulations to their normal juxtaposition.

The transcript of the administrative proceedings reveals that the board members were clearly interested in whether the treatment of the petitioner was to "realign vertebrae". Some of the questions and testimony concerning such issues are found at T35-T39, T52-T55, T99-T102. Additionally, the evidence received supports the board's decision. The board's findings evidence that the board considered the, "Complaintant's testimonial description of her and Respondent's body and hand positions, pressure used,

documentary evidence submitted and testimony of the various expert witnesses" in finding that the petitioner's actions were "spinal manipulations."

5. The petitioner's next argument is that the petitioner was exempt from prosecution under the Chiropractic Act because he was performing in his area of practice as a physical therapist. Because the court has determined that there is substantial evidence to support the board's finding that the petitioner engaged in "spinal manipulation" and because physical therapists are specifically proscribed from engaging in "spinal manipulations" this argument is denied.

6. The petitioner raises a constitutional due process argument. The argument is that the Chiropractic Act's prohibition against a physical therapist performing a "manipulation" is unconstitutional because it is impossible to distinguish between a "mobilization" and a "manipulation" as statutorily defined. In addressing this issue it must first be noted that there appears to be some legislative overlap with respect to "mobilizations." A.C.A. § 17-81-303(d)(l) states that it is unlawful except for chiropractors or physicians to perform "spinal mobilizations." A.C.A. § 17-81-303(d)(2) provides that foregoing subsection shall not be "construed to limit or restrict the authority of a licensed physical therapist to practice physical therapy as defined in A.C.A. § 17-93-102(6)." A.C.A. *5* 17-93-102(6) allows physical therapists to perform "mobilization, i.e., passive movement accomplished within normal range of motion of the joint, but excluding spinal manipulation and adjustment." This argument also fails. It is clear that under the physical

therapy statutes "mobilization" is limited to "passive movement accomplished within normal range of motion of the joint." "Spinal manipulation," as defined by A.C.A. § 17-81-102(7) involves "corrective force or passive movement of the joint" to "realign vertebrae or articulations to their normal juxtaposition." At first glance it appears that there might again be a legislative overlap in that "passive movement of the joint" could be "spinal manipulation" under A.C.A. § 17-81-102(7) or it could be a "mobilization" under A.C.A. § 17-93-102(6). The balance of A.C.A. § 17-93-102(6) provides the resolution in that physical therapists are specifically prohibited from engaging in "spinal manipulation," a defined term. When the two defined terms are placed together the statutory provisions state that physical therapists are permitted to perform "mobilization, i.e., passive movement accomplished within normal range of motion of the joint, but excluding" "corrective force or passive movement of the joint to realign vertebrae or articulations to their normal juxtaposition." [spinal manipulation]

7. The petitioner's final argument is that A.C.A. § 17-81-303 is a penal statute and must be strictly construed in favor of the petitioner. Until there is a finding of ambiguity there is no need for statutory construction outside the plain and ordinary meaning of the language utilized in the statute. There is no ambiguity in the language of the statutes and accordingly this argument of the petitioner fails.

8. There being substantial evidence to support the action of the administrative agency, the *Petition for Judicial Review and for Stay of Agency Decision* should be and hereby

is accordingly denied and the administrative decision is affirmed.

IT IS SO ORDERED.

s/ Timothy Davis Fox
TIMOTHY DAVIS FOX
CIRCUIT JUDGE

9/19/03
DATE

APPENDIX C — FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

SUPREME COURT OF ARKANSAS

BEFORE THE ARKANSAS STATE BOARD OF CHIROPRACTIC EXAMINERS

NO: 193-05-21-02

***IN THE MATTER OF*:**
MICHAEL TESTON, P.T.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

On Tuesday, December 10, 2002, the Arkansas State Board of Chiropractic Examiners (the "Board") held an adjudicatory hearing to determine whether Respondent, Mr. Michael Teston, P.T. ("Respondent") should be administratively disciplined for alleged violations of the Arkansas Chiropractic Practices Act, Ark. Code Ann. § 17-81-101, et. seq. and the Regulations of the Board.

Mr. Teston appeared personally and was represented by Attorney M. Wade Hodge. The Board was represented by Assistant Attorney General Kim H. Evans. Present for the hearing were Board President Dr. Michael Courtney and Board members, Dr. Larry Grinder, Mr. Harold Gunter, Dr. Beverly Foster and Dr. Mark Bradley.

Appendix C

After reviewing documents received into evidence, hearing sworn testimony and hearing arguments of counsel, the Board makes the following finds of fact and conclusions of law:

FINDINGS OF FACT

F-1. At all times pertinent to this hearing, Respondent has been unlicensed to practice chiropractic in the State of Arkansas.

F-2. Between January and April 2001, Respondent treated Complainant, Katherine Fryar, as a physical therapist following a car accident.

F-3. During the three-month period, Respondent's treatments included popping Complainant's cervical, thoracic and lumbar regions of spine. Based on Complainant's testimonial description of her and Respondent's body and hand positions, pressure used, documentary evidence submitted and testimony of the various expert witnesses, the board finds that the maneuvers described by Complainant were spinal manipulations which can only be performed by licensed Chiropractors in the State of Arkansas. Due to Complainant's inability to remember how many manipulations were performed, this finding shall constitute one violation.

F-4. Based on Respondent's testimony that the maneuvers were common in his practice, the Board finds that Respondent may have treated others similarly. Due to the speculative nature of the finding, it shall not count as a violation.

F-5. On May 30, 2002, the Board's investigator, Dennis Hendrix, visited Respondent's clinic as part of his

investigation and was treated. Respondent's treatments included an upper body twisting maneuver that created a popping in the spine. Based on Mr. Hendrix's testimonial description of his and Respondent's body and hand positions, force used, documentary evidence submitted and testimony of the various expert witnesses, the board finds that the maneuver described by Mr. Hendrix was a spinal manipulation which can only be performed by licensed Chiropractors in the State of Arkansas. This finding shall constitute one violation.

CONCLUSIONS OF LAW

B-1. Respondent's actions violated Arkansas Code Annotated § 17-81-303(a)(1) which prohibits the practice and offer to practice chiropractic in the State of Arkansas without a license.

B-2. Respondent's violation of Arkansas Code Annotated § 17-81-303 (a)(1) constitutes grounds for the Board to levy a fine of not more than $5,000 for each violation pursuant to Arkansas Code Annotated § 17-81-303(e)(1).

Appendix C

ORDER

Based on the Findings of Fact and Conclusions of Law above, the Board orders that Mr. Michael Teston, P.T. be fined $5,000.00 per violation for a total of $10,000.00. The fine shall be paid to the Arkansas State Board of Chiropractic Examiners within thirty (30) days of receipt of this order.

This is a final order of the Board and, as such, is subject to judicial review pursuant to the Arkansas Administrative Procedures Act, Ark. Code Ann. § 25-15-201, et. seq.

Entered this 13th day of January 2003.

ARKANSAS STATE BOARD OF CHIROPRACTIC EXAMINERS

BY:
s/ Michael Courtney, D.C.
Dr. Michael Courtney, D.C., President

DATE: Jan. 13th, 2003

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF ARKANSAS DENYING PETITION FOR REHEARING DATED MAY 12, 2005

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

May 12, 2005

John Purifoy Gill
Attorney at Law
425 West Capitol, Suite 3801
Little Rock, AR 72201

RE: 04 00420. Michael Teston v. Arkansas State Board of Chiropractic Examiners

Dear Mr. Gill:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Brown and Imber, JJ., not participating."

Sincerely,

s/ Leslie W. Steen
Leslie W. Steen, Clerk

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.S. Const. Art. VI, Cl. 2 (2005)

Cl. 2. Supreme Law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S.C.S. Const. Amend. 14, § 1 (2005)

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix E

§ 17-81-102. Definitions. – As used in this chapter, unless the context otherwise requires:

(1) 'Board' means the Arkansas State Board of Chiropractic Examiners;

(2) 'Chiropractic' means that science and art which utilizes the inherent recuperative powers of the body and deals with the relationship between the nervous system and the spinal column, including its immediate articulations, and the role of its relationship in the restoration and maintenance of health;

(3)(A) 'Practice of chiropractic' means the engagement in the diagnosis and analysis of any interference with normal nerve transmission and expression, and the procedure preparatory to and complementary to the correction thereof by an adjustment of the articulations of the vertebral column, its immediate articulations, including spinal adjustments, spinal manipulations and spinal mobilizations, such as any type of pressure, force, thrust or passive movement, singular or plural, applied to the spinal vertebrae or their adjacent articulations by hand or mechanical device or by other incidental adjustments, for the restoration and maintenance of health. The practice of chiropractic includes therapy, the normal regimen, and rehabilitation of the patient for the purpose of removing any injury, deformity or abnormality of human beings without the use of drugs or surgery.

Appendix E

(B) The practice of chiropractic, as authorized under the provisions of this chapter shall not include the performance of the duties of a midwife or obstetrician, therapy by the use of ionizing radiation, incisive surgery, prescribing for or administering to any person any drug to be taken internally, or puncturing the skin for the purpose of introducing any substance into the body. Nothing herein shall prevent puncturing the skin for routine blood analysis, including red blood count, white blood count, differential and serology, in the practice of chiropractic for diagnostic purposes;

(4) 'Analysis' includes physical examination, the use of x-ray and other analytical instruments and procedures generally used in the practice of chiropractic;

(5) 'Spinal manipulation' and "adjustment" mean the skillful or dexterous treatment whereby a corrective force or passive movement of the joint is made to realign vertebrae or articulations to their normal juxtaposition;

(6) 'Chiropractic aide' means an unlicensed member of the chiropractic team who may assist a chiropractic physician in the performance of those procedures and techniques constituting the practice of chiropractic as defined in this chapter with the exception of spinal manipulation and adjustment, provided that such assistance shall be performed under the direct supervision of a licensed chiropractic physician; and

(7) 'Physician' means a person authorized or licensed to practice medicine pursuant to the Arkansas Medical Practices Act, § 17-93-201 et seq., a person authorized or licensed to practice chiropractic pursuant to the provisions of this chapter, and a person authorized to practice osteopathy pursuant to 17-90-101 – § 17-90-103.

§ 17-81-201. Creation – Members – Appointment.

(a) The Arkansas State Board of Chiropractic Examiners is established,

(b) The board shall be composed of seven (7) members appointed by the Governor for terms of five (5) years.

(1) Five (5) members shall be qualified chiropractors. At least thirty (30) days prior to the expiration of the term of office of each professional member, the various chartered chiropractic state organizations may submit to the Governor a list of three (3) names of qualified chiropractors for each position for which a term expires. On or before June 30 of each year, the Governor may appoint a person to fill each position for which the term of office expires from the list.

(2) Two (2) members of the board shall not be actively engaged in or retired from the profession of chiropractic. One (1) shall represent consumers, and one (1) shall be sixty (60) years of age or older and shall be the representative of the elderly. Both

shall be appointed from the state at large subject to confirmation by the Senate. The two (2) positions may not be held by the same person. Both shall be full voting members but shall not participate in the grading of examinations.

(c) When a vacancy occurs on the board for any reason, the vacancy may be filled by appointment by the Governor for the unexpired term. Vacancies of professional members may be filled from a list of three (3) names of qualified chiropractors submitted by various chartered chiropractic state organizations.

§ 17-81-303. Unlawful practice – Penalty – Injunction.

(a) It shall be unlawful for any person not licensed under the provisions of this chapter:

(1) To practice or offer to practice chiropractic; or (2) To use any sign, card or device to indicate that the person is a professional licensed doctor of chiropractic.

(b) Any person who shall attempt to practice chiropractic, as defined in this chapter, without having first been licensed or otherwise permitted under the provisions of this chapter to do so, shall be deemed guilty of a misdemeanor. Upon conviction, he shall be punished by a fine of not less than one thousand dollars ($1000) nor more than two thousand dollars ($2000) or by

imprisonment in the county jail for a period of not less than one (1) month nor more than eleven (11) months, or by both fine and imprisonment. Each day shall constitute a separate offense.

(c) The courts of this state having general equity jurisdiction are vested with jurisdiction and power to enjoin the unlawful practice of chiropractic in a proceeding by the board or any member thereof, or by any citizen of this state, in the county in which the alleged unlawful practice occurred or in which the defendant resides, or in Pulaski County. The issuance of an injunction shall not relieve a person from criminal prosecution for violation of the provisions of this chapter, but the remedy of injunction shall be in addition to liability to criminal prosecution.

(d)(1) It is unlawful for any person other than a physician licensed to practice chiropractic under the provisions of the Arkansas Chiropractic Practices Act, § 17-81-101 et seq., or a physician licensed to practice medicine under the Arkansas Medical Practices Act, which begins at § 17-95-201, to perform spinal mobilizations, spinal adjustments, or spinal manipulations as those terms are defined in § 17-81-102(5).

(2) Nothing contained in this subsection shall be construed to limit or restrict the authority of a licensed physical therapist to practice physical therapy as defined in § 17-93-102(1).

(3) Any person violating the provisions of this subsection shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five thousand dollars ($5000), and each violation shall constitute a separate offense. [Acts 1971, No. 706, §§ 2, 14, 22; A.S.A. 1947, § 72-416, 72-428, 72-436; Acts 1987, No. 50 §§ 1, 2; 1987, No. 354, § 9].

SECTION 3. Arkansas Code § 17-81-303 is amended to add the following new subsection:

(e)(l) If the board determines, after due notice and a hearing, that any provision of this chapter or any regulation promulgated by the board pursuant to this chapter has been violated, the board may impose a civil penalty not to exceed five thousand dollars ($5000) per violation.

(2)(A) The board may file an action in the Circuit Court of Pulaski County to collect any civil penalty not paid within thirty (30) days of service of the order assessing the penalty, unless the circuit court enters a stay of the board's order. (B) If the board prevails in the action, the defendant shall be directed to pay reasonable attorney's fees and costs incurred by the board in prosecuting the action in addition to the civil penalty.

(3) Any person aggrieved by an action of the board imposing civil penalties may appeal the decision in the manner and under the procedure

prescribed in the Arkansas Administrative Procedure Act, which begins at § 25-15-201 for appeals from administrative decisions.

§ 17-93-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Board" means the Arkansas State Board of Physical Therapy;

(2) "Direct supervision" means that the supervising therapist is on-site and available for consultation;

(3) "Physical therapist" means a person who practices physical therapy as defined in this chapter having successfully completed a curriculum of physical therapy as accredited by a national accreditation agency approved by the board and having passed a nationally recognized licensing examination;

(4)(A) "Physical therapist assistant" means a person who:

(i) Assists in the practice of physical therapy under the supervision of a physical therapist;

(ii) Has successfully completed a physical therapist assistant curriculum accredited by a national accreditation agency approved by the board; and

(iii) Has passed a nationally recognized licensing examination.

(B) The physical therapist assistant's function is to:

(i) Assist the physical therapist in the patient-related activities;

(ii) Perform procedures delegated to him or her by the licensed physical therapists that are commensurate with his or her education and training;

(iii) Function as a participating team member who contributes to total patient care and assists the physical therapist in carrying out complete procedures and programs; and

(iv) Observe and report to his or her supervisor conditions, reactions, and responses related to his or her assigned duties.

(C) The physical therapist assistant shall not interpret the orders, perform evaluation procedures, or assume responsibility for planning patient care;

Appendix E

(5) "Physical therapy aide" means an unlicensed member of the physical therapy team who may perform treatments under the direct supervision of a physical therapist or physical therapist assistant;

(6) "Practice of physical therapy" means:

(A) Examining and evaluating patients with mechanical, physiological and developmental impairments, functional limitations, and disability or other health-related conditions in order to determine a physical therapy diagnosis, prognosis, and planned therapeutic intervention;

(B)(i) Alleviating impairments and functional limitations by designing, implementing, and modifying therapeutic interventions that include:

(a) Therapeutic exercise;

(b) Functional training in self-care as it relates to patient mobility and community access;

(c) Manual therapy techniques, including soft tissue massage, manual traction, connective tissue massage, therapeutic massage, and mobilization, i.e., passive movement accomplished within normal range of motion of the joint, but excluding spinal manipulation and adjustment;

(d) Assistive and adaptive devices and equipment as they relate to patient mobility and community access;

(e) Physical agents;

(f) Mechanical and electrotherapeutic modalities; and

(g) Patient-related instruction.

(ii) The therapeutic intervention of bronchopulmonary hygiene, and debridement and wound care requires a physician referral prior to initiation of treatment.

(iii) Physical therapy shall not include radiology or electrosurgery;

(C) Preventing injury, impairments, functional limitations, and disability, including the promotion and maintenance of fitness, health, and quality of life in all age populations; and

(D) Engaging in consultation, testing, education, and research; and

(7)(A) "Supervision" means that the supervising therapist retains moral, ethical, and legal responsibility for patient care and is readily available for consultation.

(B) The supervising therapist is not required to be on-site but must be at least available by telecommunication.

§ 25-15-209. Administrative adjudication – Communication by decision maker

(a) Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make final or proposed findings of fact or conclusions of law in any case of adjudication shall not communicate, directly or indirectly, in connection with any issue of fact with any person or party nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

(b) An agency member may:

(1) Communicate with other members of the agency; and

(2) Have the aid and advice of one (1) or more personal assistants.

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§ 25-15-210. Administrative adjudication – Decisions

(a) When, in a case of adjudication, a majority of the officials of the agency who are to render the decision have not heard the case or read the record, the decision, if adverse to a party other than the agency, shall not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary thereto, prepared by the person who conducted the hearing.

(b)(1) In every case of adjudication, a final decision or order shall be in writing or stated in the record.

(2) A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.

(c) Parties shall be served either personally or by mail with a copy of any decision or order.

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§ 25-15-211. Administrative adjudication – Licenses

(a) When the grant, denial, or renewal of a license is required by law to be preceded by notice and an opportunity for hearing, the provisions of this subchapter concerning cases of adjudication apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order, or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless the agency gives notice by mail to the licensee of facts or conduct warranting the intended action and unless the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action, which proceedings shall be promptly instituted and determined.

(d)(1) A complaint filed by an offender with a state licensing board or state licensing agency against a licensee of the board or agency shall not be heard by the board or agency unless the complaint is accompanied by appropriately verified documentation showing that the offender has exhausted all administrative remedies under the Department of Correction grievance procedure.

(2) For purposes of this section, "offender" means any person sentenced to the Department of Correction or sentenced to the Department of Correction for judicial transfer to the Department of Community Punishment or any person confined in a community punishment center as a condition of probation, suspended imposition of sentence, or post prison transfer.

§ 25-15-212. Administrative adjudication – Judicial review

(a) In cases of adjudication, any person, except an inmate under sentence to the custody of the Department of Correction, who considers himself or herself injured in his or her person, business, or property by final agency action shall be entitled to judicial review of the action under this subchapter. Nothing in this section shall be construed to limit other means of review provided by law.

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(b)(1) Proceedings for review shall be instituted by filing a petition within thirty (30) days after service upon petitioner of the agency's final decision in:

(A) The circuit court of any county in which the petitioner resides or does business; or

(B) Pulaski County Circuit Court.

(2) Copies of the petition shall be served upon the agency and all other parties of record in accordance with the Arkansas Rules of Civil Procedure.

(3) In its discretion, the court may permit other interested persons to intervene.

(c) The filing of the petition does not automatically stay enforcement of the agency decision, but the agency or reviewing court may do so upon such terms as may be just. However, on review of disciplinary orders issued by professional licensing boards governing professions of the healing arts, the reviewing court, only after notice and hearing, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of review proceedings.

(d)(1) Within thirty (30) days after service of the petition or within such further time as the court may allow but not exceeding an aggregate of ninety (90) days, the agency shall transmit to the reviewing court

the original or a certified copy of the entire record of the proceeding under review.

(2) The cost of the preparation of the record shall be borne by the agency. However, the cost of the record shall be recovered from the appealing party if the agency is the prevailing party.

(3) By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs.

(4) The court may require or permit subsequent corrections or additions to the record.

(e) If review proceedings have been instituted in two (2) or more circuit courts with respect to the same order, the agency concerned shall file the record in the court in which a proceeding was first instituted. The other courts in which the proceedings are pending shall thereupon transfer them to the court in which the record has been filed.

(f) If before the date set for hearing, application is made to the court for leave to present additional evidence and the court finds that the evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon any conditions which may be just. The agency may modify its findings and decision by

reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency not shown in the record, testimony may be taken before the court. The court shall, upon request, hear oral argument and receive written briefs.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the agency's statutory authority;

(3) Made upon unlawful procedure;

(4) Affected by other error or law;

(5) Not supported by substantial evidence of record; or

(6) Arbitrary, capricious, or characterized by abuse of discretion.

(i) Any agency order which is affirmed or affirmed in part by the court shall be a final judgment subject to writ of garnishment or execution to the extent it is affirmed.

§ 25-15-213. Hearings generally

In every case of adjudication, and in cases of rule making in which rules are required by law to be made on the record after opportunity for an agency hearing, and in cases of rule making in which, pursuant to § 25-15-204(a)(2), the agency shall direct that oral testimony be taken or a hearing held:

(1) Any person compelled to appear before any agency or representative thereof shall have the right to be accompanied and advised by counsel. Every party shall have the right to appear in person or by counsel;

(2)(A) There shall preside at the hearing:

(i) The agency;

(ii) One (1) or more members of the agency; or

(iii) One (1) or more examiners or referees designated by the agency.

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(B) All presiding officers and all officers participating in decisions shall conduct themselves in an impartial manner and may at any time withdraw if they deem themselves disqualified.

(C) Any party may file an affidavit of personal bias or disqualification. The affidavit shall be ruled on by the agency and granted if timely, sufficient, and filed in good faith;

(3)(A) Presiding officers shall have power, pursuant to published procedural rules of the agency:

(i) To issue subpoenas if the agency is authorized by law to issue them;

(ii) To administer oaths and affirmations;

(iii) To maintain order;

(iv) To rule upon all questions arising during the course of a hearing or proceeding;

(v) To permit discovery by deposition or otherwise;

(vi) To hold conferences for the settlement or simplification of issues;

(vii) To make or recommend decisions; and

(viii) Generally to regulate and guide the course of the pending proceeding.

(B) In any proceeding before any agency, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey any lawful order of an agency contained in its decision rendered after hearing, the agency or the presiding officer of the agency hearing may apply to the circuit court of the county where the proceedings were held or are being held or to the circuit court of the county where a petition for judicial review was filed for an order directing that person to take the requisite action or to otherwise comply with the order of the agency. The court shall issue the order in its discretion. Should any person willfully fail to comply with an order so issued, the court shall punish him or her as for contempt;

(4) Except as otherwise provided by law, the proponent of a rule or order shall have the burden of proof. Irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted of record. When a hearing will be expedited and the interests of the parties will not be substantially prejudiced, any part of the evidence may be received in written form;

(5) Parties shall have the right to conduct such cross examination as may be required for a full and true disclosure of the facts; and

(6) Official notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of material so noticed, including any staff memoranda or data, and shall be afforded a reasonable opportunity to show the contrary.

APPENDIX F — CHIROPRACTIC EXAMINERS BOARD

Docket No.: 029.00.88-003

Effective Date: 8-22-88

Contact Person: Richard W. Spelzhaus, D.C.

Amended Rules and Regulations

PART ONE
PRELIMINARY DEFINITIONS

A. BOARD. The Arkansas State Board of Chiropractic Examiners.

B. REGULATIONS. Those acts, statements or definitions by which the chiropractic profession is governed or regulated in conduct, actions or practice.

C. RULES. Those procedures by which the Board exercises its authority and responsibility and conducts its affairs.

* * *

Appendix F

ADOPTED RULES

PART THREE
RULES OF PROCEDURE

A. BOARD MAY INVESTIGATE COMPLAINTS. This Board shall have the right and responsibility, as provided by law, to investigate complaints, allegations, or suspicions of violations of the Arkansas Chiropractic Practices Act or of these Regulations.

B. METHOD FOR HEARINGS. All hearings before the Board shall be conducted according to the Arkansas Administrative Procedures Act, Ark. Stat. Ann. §5-701, et seq., with the following additions:

1. Notice.

(a) Except as provided in Section 2, whenever the Board contemplates taking disciplinary action, it shall serve a written notice upon the licensee at least thirty (30) days before the action is taken. This thirty (30) day requirement may be waived upon agreement of both parties.

(b) The notice shall include a Statement of the facts or conduct upon which disciplinary action is contemplated and shall inform the licensee of his right to a hearing and state the time and place where the hearing is scheduled. The notice shall also inform the licensee that continuance will be granted only for good cause and that if the licensee fails to appear at the

hearing and has not obtained a continuance, then the Board may conduct the hearing in the licensee's absence.

(c) The notice shall be issued in the Board's name and shall be signed by the President, Executive Director, or the Board's Attorney.

(d) The notice shall be served either personally or by registered or certified mail addressed to the licensee's current business address on file with the Board. If personal service is used, it may be proven by affidavit or testimony of the server and shall be deemed served on the date delivered. When service is by mail, it shall be deemed served on the date borne by the return receipt showing delivery, refusal, or inability to deliver.

2. Emergency Action

Not withstanding Section 1, if the Board finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action, which proceedings shall be promptly instituted and determined.

Appendix F

3. Continuances.

A continuance shall be granted only for good cause.

4. Failure to Appear.

If a licensee, after being served notice, fails to appear at the time and place where the hearing is scheduled and has not obtained a continuance, then the Board may conduct the proceedings without the licensee being present.

5. Presiding Officer.

The President shall be the Presiding Officer at all hearings, except if the President is unavailable, then a majority of Board members present shall select a Presiding Officer from among themselves present. The Presiding Officer shall have power to (a) issue subpoenas, (b) administer oaths and affirmations, (c) maintain order, (d) rule on all questions arising during the proceedings, (e) permit discovery by deposition or otherwise, (f) hold conferences for the settlement of simplification of issues, (g) make or recommend decisions, and (h) generally regulate and guide the course of the pending proceeding.

Appendix F

6. Decisions.

A final decision shall be in writing or stated in the record. It shall include findings of fact and conclusions of law, separately stated. Parties shall be served either personally or by mail with a copy of any decision or order within a reasonable time.

C. INFORMAL DISPOSITION OF COMPLAINTS. As provided by the Arkansas Administrative Procedures Act, nothing contained herein shall prohibit informal disposition of complaints or allegations by settlement, consent, or agreement of parties.

D. COMPLAINT HANDLING PROCEDURES.

1. Complaints against Chiropractic physicians may be made by letter, in person, or by telephone call to the President, Secretary or Executive Director of the Board of Examiners.

2. Upon receipt of the complaint by the Board, the President, designated Board's investigator, and the Board's Attorney together, decide whether to investigate the complaint. All complaints shall be logged in a special record which shall be updated as necessary to indicate current status of all complaints.

3. Said complaints may be investigated by one or more of the Board members or agents of the Board. Informal disposition may be attempted by settlement,

consent, agreement, or for lack of sufficient probable cause if, in the opinion of the Board, such disposition is warranted by the circumstances.

4. Any and every complaint making out a prima facie case shall be presented to and reasonably disposed of by the Board, giving due consideration to sufficient and necessary time to investigate and consider the complaint. Upon completion of an investigation, the President, designated Board's investigator, and Board's Attorney together shall determine whether a disciplinary hearing shall be scheduled to resolve the issue.

5. Disciplinary Hearings may be conducted either on the Board's own motion or based on a written complaint if a violation of the Chiropractic Practices Act has been discovered.

6. All complaints not investigated and all complaints investigated but determined to not substantiate the charges shall be reported to the Board Quarterly.

E. AMENDMENTS TO RULES AND REGULATIONS. These rules, regulations, and definitions may be modified, added to or deleted as deemed appropriate by the Board of Examiners in the method prescribed for such charges by the laws of the State of Arkansas.

* * * *